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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

BERNARD LOVE,

Case No.: C0802012HRL

Plaintiff,

PLAINTIFF'S MEMORANDUM AND  
POINTS OF AUTHORITIES OF  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS

vs.

BAY AREA CABLEVISION, INC.,  
a California corporation,

Defendant.

Action Date: January 14, 2008  
Hearing Date: September 8, 2008  
Trial Date: Not Set  
Courtroom: 2

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The plaintiff, Bernard Love ("Mr. Love"), through counsel, Law Offices of Anthony E. Bell, Inc. and Lichtenfels, Pansing & Miller, P.C., submits the following Opposition to defendant Bay Area Cablevision, Inc.'s ("BAC") Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6).

**BACKGROUND**

1       Mr. Love's claims arise out of the purported transfer of his rights in an FCC  
2 license for broadband radio service station WNTM-579 for the Los Gatos,  
3 California area (the "License") to the defendant, BAC. The License was issued to  
4 Mr. Love, with the assistance of Kingswood Associates, a California firm, in or  
5 about 1992 (Complaint at ¶ 4). Mr. Love retained the services of Kingswood  
6 Associates to act as his agent in marketing the License. In January 1993, Mr.  
7 Love, through Kingswood Associates, executed a Channel Lease Agreement,  
8 leasing the License to Gulf American, Inc. for a renewable five-year lease term.  
9 The lease was subsequently assigned by Gulf American to BAC (Complaint at ¶¶  
10 5, 6).

11       In May 1996, a contract was prepared and executed over the signatures of  
12 BAC and Mr. Love, entitled Agreement for the Assignment of MMDS License  
13 ("Assignment Agreement"). The Assignment Agreement purported to assign Mr.  
14 Love's right and interest in the License to BAC. In his Complaint, Mr. Love  
15 alleges that his purported signature on the Assignment Agreement was a forgery,  
16 and that the Assignment Agreement was negotiated and executed without his  
17 participation, knowledge or assent. (Complaint at ¶¶ 7, 8). The payment for the  
18 purported assignment was transmitted by BAC to Kingwood Associates, which did  
19 not forward the payment to Mr. Love. Mr. Love's Complaint alleges that BAC and  
20 Kingswood Associates intentionally concealed the May 1996 transaction from him  
21 (Complaint at ¶ 10).

22       Based upon the Assignment Agreement, BAC submitted an application to  
23 the FCC for assignment of the License to BAC. The Complaint alleges that the  
24 application contained a forged signature, purporting to be that of Mr. Love.

1 (Complaint at ¶ 11). The Complaint further alleges that Kingswood Associates and  
2 BAC actively concealed the filing of the assignment application from Mr. Love.  
3 (Complaint at ¶ 12).

4 Mr. Love's Complaint asserts that, due to the fraudulent concealment by  
5 Kingwood Associates and BAC, he was not aware of the existence of the  
6 Assignment Agreement, or of the filing of the assignment application, and was  
7 unaware that the License had been purportedly assigned to BAC. (Complaint at ¶¶  
8 10, 12). Mr. Love took steps between 1998 and 2006 to ascertain the status of the  
9 lease payments which he believed were due him under the January 1993 Channel  
10 Lease Agreement, including attempts to contact Kingswood Associates and  
11 inquiries directed to the FCC. These efforts did not result in Mr. Love obtaining  
12 any information regarding the status of the License. (Complaint at ¶ 14). Mr.  
13 Love did not become aware of the purported assignment of the License to BAC  
14 until July 2006, when he received a copy of the license transfer application, the  
15 Assignment Agreement, and related documentation regarding the purported  
16 transfer, from his congresswoman's constituent service office. (Complaint at ¶  
17 15). Prior to receipt of these materials, Mr. Love had no knowledge or notice of  
18 the purported transfer of the License. (Complaint at ¶ 16).

19 This case was filed in January 2008, in the Santa Clara, California Superior  
20 Court, and was subsequently removed by BAC to this Court. Mr. Love's claim, as  
21 set forth in the Complaint, pertains to the purported transfer of the License to BAC.  
22 In the Complaint, Mr. Love seeks a declaration that the purported transfer of the  
23 License effected by the Assignment Agreement is null and void, and that he is  
24 accordingly the true owner of the License. Mr. Love is also seeking an accounting  
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1 and disgorgement of profits realized by BAC through its possession and use of the  
2 License.

3 **SUMMARY OF ARGUMENT**

4 BAC's Motion to Dismiss is based upon an argument that, based upon the  
5 allegations of the Complaint, the case was not filed within the time permitted by  
6 the applicable statute of limitations. BAC argues that the statute of limitations  
7 began to run in 1996, when BAC assumes, based upon the allegations of the  
8 Complaint, that the lease payments due under the 1993 Channel Lease Agreement  
9 ceased. BAC argues in the alternative that Mr. Love's claim accrued for statute of  
10 limitations purposes in 1998 when, according to the Complaint, Mr. Love began  
11 taking measures to ascertain the status of the lease payments due under the Lease  
12 Agreement. BAC reasons that the fact that Mr. Love began an inquiry in 1998  
13 necessarily means that he was on inquiry notice of some wrongdoing with respect  
14 to the License, as of that time.

15 BAC's Motion to Dismiss should be denied on two grounds. First, Mr.  
16 Love's claims are brought under a theory of constructive fraud, and are  
17 accordingly subject to the three-year limitation set forth in Cal. Civil Pro. Code  
18 §338(d). This section provides that an action is not deemed to have accrued until  
19 the discovery by the plaintiff of the facts constituting the fraud. The general rule is  
20 that, where the alleged fraud occurred more than three years prior to the filing of  
21 the action, the Complaint must allege the time and circumstances of the plaintiff's  
22 discovery of the fraud in order to withstand a motion to dismiss. Mr. Love's  
23 Complaint amply meets this requirement.

In addition, BAC relies in its Motion to Dismiss on an incorrect legal standard for accrual of Mr. Love’s cause of action. BAC’s argument relies upon the “discovery rule” for accrual of a cause of action for statute of limitations purposes. Under the allegations of Mr. Love’s Complaint, the accrual of Mr. Love’s claim is not subject to the discovery rule, but rather is subject to the doctrine of fraudulent concealment.

The doctrine of fraudulent concealment provides that where the conduct forming the basis for a claim has been deliberately concealed by the defendant, the statute of limitations does not begin to run until such time as the plaintiff has actual knowledge of the facts giving rise to his claim, or awareness or notice of sufficient facts to identify a particular cause of action. Under the allegations of the Complaint, Mr. Love did not have knowledge or notice of the fraudulent transfer and assignment of the License until his receipt of the materials in July 2006. This case was accordingly filed well within the time permitted by the applicable statute of limitations.

## ARGUMENT

The legal standard for determining a motion to dismiss under Fed.R.Civ.P. 12(b)(6) is well-established. There exists a powerful presumption against dismissing pleadings for failing to state a cognizable claim for relief, and such dismissals are disfavored. See, e.g., *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F. 3d 1488, 1496 (10<sup>th</sup> Cir. 1995). A Complaint may not be dismissed under Rule 12(b)(6) for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Maduka v. Sunrise Hospital*, 375 F.3d 909 (9<sup>th</sup> Cir. 2004); *Harmsen v. Smith*, 542 F.2d 496 (9<sup>th</sup> Cir. 1976). When a claim is challenged under Rule 12(b)(6), the

1 court presumes that all well-pleaded allegations are true, resolves all doubts and  
2 inferences in the pleader's favor, and views the pleading in the light most favorable  
3 to the non-moving party. *Albright v. Oliver*, 510 U.S. 266, 267, 114 S. Ct. 807,  
4 810, 127 L. Ed. 2d 114 (1994); *Olson v. United States*, 362 F.3d 1236 (9<sup>th</sup> Cir.  
5 2004).

6 **1. The allegations of the Complaint are sufficient to withstand  
7 a motion to dismiss.**

8 This is an action for declaratory relief and accounting. However, as pointed  
9 out by BAC in its motion, in determining the applicable statute of limitations, the  
10 character of the action is determined by the nature of the claim sued upon, rather  
11 than the relief sought. In its motion BAC states, correctly, that the claim set forth  
12 in the Complaint as the basis for the requested relief is not actual fraud. Rather,  
13 Mr. Love's claim is based on a theory of constructive fraud, as provided by Cal.  
14 Civil Code §1573. The gist of Mr. Love's claim is that BAC and Mr. Love's  
15 agent, Kingswood Associates, conspired to divest him of his rights in the License,  
16 without his knowledge or assent. (Complaint at ¶¶ 7-12). Mr. Love's claim, as  
17 stated in the Complaint, meets the elemental definitions of constructive fraud. See,  
18 e.g., *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d 1177 (C.D. Cal. 2006); *Tyler v.*  
*Children's Home Society*, 35 Cal. Rptr. 2d 291, 29 Cal. App. 4<sup>th</sup> 511 (3 Dist. 1994).

19 Claims brought on a theory of constructive fraud, including claims arising  
20 out of conversion or misappropriation of property by persons in confidential  
21 relation with the plaintiff, are governed by Section (d) of Cal. Civil Pro. Code  
22 §338, which provides for a three-year statute of limitations. *Parsons v. Tickner*, 37  
23 Cal. Rptr. 2d 810, 816, 31 Cal. App. 4<sup>th</sup> 1513 (2 Dist. 1995); *Agair Incorporated v.*  
24 *Shaeffer*, 42 Cal. Rptr. 883, 885-86, 232 Cal. App. 2d 513 (3 Dist. 1965). Section  
25

1 338(d) contains a specific provision regarding accrual, stating that a cause of action  
2 subject to the section is not to be deemed to have accrued until the discovery by the  
3 aggrieved party of the facts constituting the fraud or mistake.

4       The accrual provision contained in §338(d) has given rise to specific  
5 pleading requirements for causes of action subject to the section. The rule is that,  
6 where the alleged fraud occurred more than three years prior to the filing of the  
7 action, the Complaint must allege the time and circumstances of the plaintiff's  
8 discovery of the fraud, in order to withstand a motion to dismiss. *McDowell v.*  
9 *Union Mutual Life Insurance Co.*, 404 F. Supp. 136 (C.D. Cal. 1975); *Remus*  
10 *Films, Limited v. William Morris Agency, Inc.*, 53 Cal. Rptr. 526, 244 Cal. App. 2d  
11 763 (2 Dist. 1966); *Gross v. Needham*, 6 Cal. Rptr. 2d 664, 184 Cal. App. 2d 446  
12 (2 Dist. 1960).

13       Mr. Love's Complaint fully meets the applicable pleading requirements.  
14 The Complaint contains detailed allegations regarding the time and circumstances  
15 of Mr. Love's discovery of the purported transfer of the License, and details his  
16 efforts to obtain information regarding the License. (Complaint at ¶¶ 14-16). Mr.  
17 Love's Complaint contains the allegations necessary to withstand a motion to  
18 dismiss; BAC's motion should be denied on this ground alone.

19       **2. The motion to dismiss relies upon an incorrect legal standard for  
accrual of Mr. Love's cause of action.**

20       In addition to overlooking the special pleading requirements under the  
21 applicable statute of limitations, BAC fails to apply the proper legal standard for  
22 accrual of the cause of action stated in Mr. Love's Complaint. In arguing that Mr.  
23 Love's cause of action accrued more than three years prior to the filing of the  
24

1 action, BAC relies on the “discovery rule”. BAC’s reliance on the discovery rule  
2 is misplaced.

3 A cause of action ordinarily accrues for statute of limitations purposes when  
4 it is ‘complete with all of its elements’. *Norgart v. Upjohn Co.*, 21 Cal. 4<sup>th</sup> 383,  
5 397, 87 Cal Rptr. 2d 453 (1999). The discovery rule is an exception to the  
6 standard rule of accrual. The discovery rule postpones accrual of a cause of action  
7 until the plaintiff discovers, or has reason to discover, the cause of action. A  
8 plaintiff is held to discover his cause of action when he suspects or should suspect  
9 that his injury was caused by some wrongdoing. *Jolly v. Eli Lilly and Co.*, 44 Cal.  
10 3d 1103, 1110, 245 Cal. Rptr. 658 (1988); *Kline v. Turner*, 87 Cal. App. 4<sup>th</sup> 1369,  
11 1373-75, 105 Cal. Rptr. 2d 699 (2001). Under the discovery rule, the limitation  
12 period begins to run when a plaintiff has reason at least to suspect a factual basis  
13 for the claim. A plaintiff is held to have reason to suspect when he has notice or  
14 information of circumstances to put a reasonable person on inquiry; he need not  
15 know the specific facts necessary to establish the cause of action. *Norgart v.*  
16 *Upjohn Co.*, *supra*, 21 Cal. 4<sup>th</sup> at 397-98 (1999).

17 The fraudulent concealment doctrine constitutes a separate basis on which to  
18 delay accrual of a cause of action or statute of limitations purposes. The fraudulent  
19 concealment doctrine provides that where a defendant has deliberately concealed  
20 from the plaintiff the conduct giving rise to a cause of action, the statute of  
21 limitations does not begin to run until the plaintiff has knowledge or notice of the  
22 facts giving rise to the specific cause of action asserted. *Garamendi v. SDI*  
23 *Vendome S.A.*, 276 F. Supp. 2d 1030, 1042-43 (C.D. Cal. 2003); *Migliori v. Boeing*  
24 *North American, Inc.*, 114 F. Supp. 2d 976, 982-985 (C.D. Cal. 2000). Unlike the  
25 discovery rule, the “notice” which is sufficient under the fraudulent concealment

1 doctrine to trigger accrual of the statute of limitations is not simply suspicion that  
2 wrongdoing caused the plaintiff's injury; rather, notice under the fraudulent  
3 concealment doctrine requires an awareness by the plaintiff of sufficient facts to  
4 identify the particular cause of action. *Migliori v. Boeing North American, Inc.*,  
5 *supra*, 114 F. Supp. at 984. If a plaintiff suspects that he has been wronged, but  
6 does not know the specific facts that constitute the wrong, the running of the  
7 statute of limitations remains suspended until he learns of those facts, where the  
8 defendant has taken steps to conceal them. This is true even if the plaintiff is  
9 already on inquiry notice as to his claim. *Garamendi v. SDI Vendome S.A.*, *supra*,  
10 276 F. Supp. 2d at 1042-43. Accordingly, where intentional concealment tolls a  
11 statute of limitations, something closer to actual knowledge than mere inquiry  
12 notice is required to end the tolling period. *Garamendi v. SDI Vendome S.A.*,  
13 *supra*, 276 F. Supp. 2d at 1042, citing *Migliori v. Boeing North American, Inc.*,  
14 *supra*, 114 F. Supp. 2d at 983-85.

15 In order to establish fraudulent concealment, the Complaint must contain  
16 allegations showing (1) when the fraud was discovered; (2) the circumstances  
17 under which the fraud was discovered; and (3) that the plaintiff was not at fault  
18 for failing to discover it or had no actual or presumptive knowledge of facts to put  
19 him on inquiry. *Migliori v. Boeing North American, Inc.*, *supra*, 114 F. Supp. 2d at  
20 983, citing *Baker v. Beech Aircraft Corp.*, 39 Cal. App. 3d 315, 321, 114 Cal. Rptr.  
21 171 (1974). See also, *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F. 2d 499,  
22 505 (9<sup>th</sup> Cir. 1988).

23 The doctrine of fraudulent concealment applies under the allegations set  
24 forth in Mr. Love's Complaint. The Complaint alleges that BAC and Kingswood  
25 Associates, Inc. intentionally concealed from him the purported transfer of the

1 License, and the application to the FCC for assignment of the License. (Complaint  
2 at ¶¶ 10, 12). The Complaint states that Mr. Love undertook ongoing measures to  
3 ascertain the status of the payments due for his supposed lease of the License,  
4 including repeated attempts to contact Kingswood Associates, and inquiries  
5 directed to the FCC; despite these efforts, Mr. Love received no information  
6 regarding the existence of the purported assignment of the License. In early 2006,  
7 having failed at all other attempts to obtain information regarding the status of the  
8 License, Mr. Love contacted the office of U.S. Rep. Diana DeGette (D. Colo.),  
9 seeking information regarding the status of the License. In response to this  
10 request, in July 2006, Rep. DeGette's office provided Mr. Love with  
11 documentation regarding the purported transfer of the License, including the 1996  
12 Assignment Agreement and the transfer applications submitted by BAC to the  
13 FCC. (Complaint at ¶¶ 14, 15). The Complaint further alleges that, prior the  
14 receipt of the documentation from Rep. DeGette's office in July 2006, Mr. Love  
15 had no knowledge or notice of the purported transfer of the License. (Complaint at  
16 ¶ 16).

17 The accrual principles of the fraudulent concealment doctrine are fully  
18 applicable given the factual allegations of the Complaint. Under these allegations,  
19 Mr. Love's cause of action accrued in July 2006, at the time he received the  
20 documentation regarding the transfer of the License. Until that time, Mr. Love had  
21 no knowledge or notice that the License had been transferred. (Complaint at ¶ 16).  
22 This case was filed in January 2008, less than 2 years after Mr. Love's cause of  
23 action accrued, and was accordingly filed within the time provided by the  
24 applicable statute of limitations.

1       BAC urges in its motion that BAC's filing of its license transfer application  
2 with the FCC (Complaint at ¶ 11) in some way resulted in imputed notice to Mr.  
3 Love of the Assignment Agreement, and transfer of the License. BAC's argument  
4 is not supported by the applicable law. It is well-established that the mere  
5 availability of information in public records does not by itself result in imputed  
6 knowledge of that information to a plaintiff. *Bibeau v. Pacific Northwest Research*  
7 *Foundation, Inc.*, 188 F. 3d 1105, 1111 (9<sup>th</sup> Cir. 1999); *Conmar Corp. v. Mitsui*  
8 *and Co.(U.S.A.), Inc.*, 858 F. 2d 499, 503-04 (9<sup>th</sup> Cir. 1988).

9       BAC further contends in its Motion that Mr. Love's investigation, as  
10 described in the Complaint, was not reasonable. This may or may not turn out to  
11 be the case, as the relevant facts are developed during the course of the litigation.  
12 However, the question as to whether Mr. Love's investigation was reasonably  
13 diligent is a factual determination; a resolution of this factual issue would be  
14 wholly inappropriate in the context of determining a Motion to Dismiss under Rule  
15 12(b)(6).

### CONCLUSION

16       Mr. Love's claims in this case are directed to the fraudulent transfer to BAC  
17 of his rights in the License. The factual allegations of the Complaint establish that  
18 Mr. Love's cause of action accrued in July 2006, when Mr. Love finally received  
19 information regarding the purported transfer of his interest in the License. The  
20 Complaint accordingly states a claim for which relief may be granted, and BAC's  
21 Motion to Dismiss should properly be denied.

22       Respectfully submitted on August 25, 2008.

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## CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2008, I caused to be served on the interested parties in said action the foregoing MEMORANDUM AND POINTS OF AUTHORITIES OF PLAINTIFF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS via CM/ECF filing to the following:

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